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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANDRUS ENERGY CORPORATION and
BILL W. ANDRUS, PRESIDENT,
Appellants-Petitioners

v.

UNITED STATES OF AMERICA and
DEPARTMENT OF ENERGY AUDIT
DIRECTOR, JAMES LOUTHAN,
Appellees-Respondents.

ROBISON ENERGY, INC. and
GARY WOMACK, VICE-PRESIDENT,
Appellants-Petitioners,

v.

UNITED STATES OF AMERICA and
DEPARTMENT OF ENERGY,
Appellees-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES HAD SUBJECT MATTER JURISDICTION OF THESE APPEALS FROM THE DISTRICT COURTS' ORDERS ENFORCING THE DEPARTMENT OF ENERGY SUBPOENAS AGAINST PETITIONERS.

B. WHETHER THE DEPARTMENT OF ENERGY'S COMMENCEMENT OF ITS AUDITS OF PETITIONERS IN VIOLATION OF A REGULATION PROHIBITING THE DEPARTMENT FROM COMMENCING AUDITS WITHOUT "PROBABLE CAUSE" DEPRIVED PETITIONERS OF THEIR DUE PROCESS.

C. WHETHER THE DEPARTMENT OF ENERGY SUBPOENAS MUST BE INVALIDATED AS THEY CONSTITUTE UNLAWFUL GENERAL WARRANTS.

D. WHETHER THE TEMPORARY EMERGENCY COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S ORDERS ENFORCING THE DEPARTMENT OF ENERGY SUBPOENA IN LIGHT OF THE FACT THAT THE DISTRICT COURT EXPRESSLY FAILED AND REFUSED TO MAKE A DETERMINATION OF THE RELEVANCE OF THE SUBPOENAED DOCUMENTS.

LIST OF PARTIES

All of the parties to this action are named on the front cover of this Petition. The parent company of Petitioner, Andrus Energy Corporation, is Andrus Interests, Inc.

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OPINIONS BELOW

The Temporary Emergency Court of Appeals has issued an opinion in this case, a copy of which appears in

Appendix "3"[1] to this Petition. The opinion has not yet been reported.

JURISDICTION

The decision of the Temporary Emergency Court of Appeals was entered on April 9, 1982. (A.3). Petitioners' Motion for Rehearing was denied on April 30, 1982. (A. 4).

The jurisdiction of this Court is invoked under and pursuant to the Economic Stabilization Act, as amended, Section 211(G), 12 U.S.C. § 1904, note.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Due Process of Law; The Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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1. A true and correct copy of the opinion is included in the Appendix filed herewith as Appendix Three (3). Hereinafter, references to instruments found in the Appendix will be indicated as follows: (A.____).

Statutes; Economic Stabilization Act:

As these provisions related to the TECA's jurisdiction are voluminous, they are set forth in full at Appendix "5".

Regulations; The Audit Policy:

A. It is the policy of the Economic Regulatory Administration (ERA) not to commence any price regulation audits after June 30, 1978, at: (1) Any resellers, reseller-retailers or retailers (as defined in 10 CFR 212.31) of petroleum products other than propane, or (2) small resellers, small reseller-retailers, or small retailers of propane, except on suspicion of a willful violation of the price regulations, by reason of complaints or other credible indications of significant violations, or if an exception or other special relief from the price regulations has been afforded. Resellers, reseller-retailers, or retailers (as defined in 10 CFR 212.31) of propane are considered to be small if they had less than $2 million in sales of propane during calendar year 1977.

B. It is the policy of the ERA not to seek, as the result of price regulation audits commencing after June 30, 1978, to impose civil liability on: (1) Any firm described in paragraph A for transactions that occurred more than two years prior to commencement of the audit; or (2) Any other firm, except crude oil producers, crude oil resellers, and refiners in their crude oil production, sale and resale activities, for transactions that occurred more than five years prior to commencement of the audit, except where a firm has been convicted criminally for transactions covered by price regulations.

STATEMENT OF THE CASE

On January 14, 1982, the United States District Court for the Southern District of Texas, Houston Division, Judge John V. Singleton, issued an Order requiring Andrus Energy Corporation to comply with a subpoena issued by the Department of Energy (A.1). On December 21, 1981, the United States District Court for the Southern District of Texas, Houston Division, Judge Norman Black, issued an Order requiring Robison Energy, Inc., to comply with a subpoena issued by the Department of Energy (A.2).

Both of these orders were duly and timely appealed to the Temporary Emergency Court of Appeals of the United States and also to the United States Court of Appeals for the Fifth Circuit. Appeals to both Courts were essential in order to protect Petitioners' rights in light of the jurisdictional issue inherent in this case. This issue will be more fully discussed in Issue Number One (1) herein.

Petitioners' first challenge to the validity of the Department of Energy subpoenas is based on the fact that the Department did not follow its own regulation in instituting its investigation of Petitioners and in issuing the subject subpoenas.

In addition, Petitioners contend that the Department of Energy failed to state the purpose of the subject subpoenas with specificity required by law.

Petitioner Andrus further attacked the Order of the District Court enforcing the subject subpoena in light of the presiding Judge's expressed refusal to even consider the relevance of the items required in the subpoena.

Petitioners each filed Motions for Stay of the respective District Court Orders pending appeal to the Temporary Emergency Court of Appeals. On March 8, 1982, the District Court issued an Order, with an elaborate opinion, granting Petitioner Andrus' Stay. Similarly, on February 22, 1982, the District Court issued an Order granting a Stay to Petitioner Robison.

The said cases were consolidated by the Temporary Emergency Court of Appeals and an Opinion was rendered by that Court on April 9, 1982, affirming the Judgments of the district courts and dismissing Petitioners' appeals. (A.3).

On May 24, 1982, the United States Court of Appeals for the Fifth Circuit granted Respondents' Motion to Dismiss which had been previously filed by them.

A Motion for Rehearing was denied by the Temporary Emergency Court of Appeals on April 30, 1982 (A.4), and a Motion for Stay of Mandate Pending Application for Certiorari was denied by the TECA on May 11, 1982.

SUMMARY OF ARGUMENT IN SUPPORT OF CERTIORARI

A. The Jurisdictional Issue.

These consolidated cases raise a serious question regarding the jurisdiction of the Temporary Emergency Court of Appeals to review a district court Order enforcing a Department of Energy subpoena. The issue has never been resolved by this Court and will continue to plague the TECA and Circuit Courts until the issue is finally settled.

As will be hereinafter noted, the TECA has assumed jurisdiction of Department of Energy subpoena cases for "policy" reasons. However, the TECA is a court of special and limited jurisdiction, its powers derived from the Economic Stabilization Act, Emergency Petroleum Allocation Act, and the Department of Energy Organization Act. Since these Acts do not expressly grant the TECA jurisdiction to review Department of Energy subpoena cases, the Court's assumption of jurisdiction over these consolidated cases for "policy" reasons is inconsistent with the doctrine that Courts of limited jurisdiction should strictly construe their own jurisdiction.

As jurisdiction is always a fundamental and crucial issue, the Court should grant this Petition and address this complex issue.

B. The Due Process Issue.

These consolidated cases raise the important issue of whether the Department of Energy should have been bound by its regulation (audit policy) prohibiting the commencement of new audits except upon a showing of "probable cause". Thus, these cases present the fundamental constitutional issue of when Due Process requires an agency to follow its own regulations.

In upholding the District Court Orders enforcing the Department of Energy subpoenas, the Temporary Emergency Court of Appeals held[2] that an agency is required

2. The Temporary Emergency Court of Appeals did not write a comprehensive opinion on the Due Process issue raised by Petitioners because the same issue was decided by that Court in the earlier case of *United States v. Fitch Oil Company*, ____F.2d____, No. 5-70, March 23, 1982 (Em. App.). Thus, the TECA decided the present

to follow only those regulations mandated by statute or the Constitution. This ruling unquestionably conflicts with several cases decided by this Court, including the recent case of *United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465 (1979), in which this Court recognized the Due Process Clause as another reason to bind an agency to its regulations. Moreover, the TECA's decision in *Fitch Oil* is in direct conflict with the Fourth Circuit case of *United States v. Heffner*, 420 F.2d 809 (4th Circ. 1969). There, the Court, based on Supreme Court precedent, concluded that a determination of whether an agency's procedure is mandated by the Constitution or statute has no bearing on whether the agency's violation of that procedure violates an individual's Due Process.

The Temporary Emergency Court of Appeals held that the "audit policy" in question was just that, an audit policy, and not a rule or regulation binding on the Department of Energy. As a result, it held that such an audit policy should not hinder the enforcement of the subpoenas in question. This conclusion, however, raises a material conflict between the Fourth Circuit, and the Circuits which have followed the Fourth Circuit, and the Temporary Emergency Court of Appeals. In *United States v. Heffner*, the Fourth Circuit held that it does not matter that the procedure was not promulgated in something formally labeled a "Regulation" or is something less than a "Rule". The decision also conflicts with *United States v. Leahey* where the First Circuit bound the Internal Revenue Service to a mere press release.

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cases on the basis of its opinion in the *Fitch Oil* case, a case which was not further appealed to this Court. For purposes of presenting the Due Process Issue herein, Petitioners will refer to the TECA's Arguments and Conclusions in the *Fitch Oil* case.

Thus, the TECA has advanced two reasons for not binding the Department of Energy to the published "audit policy". Both reasons raise material conflicts with decisions of this Court and with decisions of the other Circuit Courts. This, in itself, offers the Court significant reason to grant this Petition for Writ of Certiorari. More importantly, Petitioners have had their Due Process violated by the Department of Energy's total disregard of its own Audit Policy. Should the TECA's decision not be overturned, the decision would undermine the concept of Due Process as a safeguard against agency intrusions on the rights of individuals.

C. Additional Arguments in Support of Certiorari.

The TECA has departed from the accepted and usual course of judicial proceeding and has sanctioned such a departure by the lower courts so as to call for an exercise of this Court's power of supervision. Established precedent dictates that the subpoenas in controversy should set forth their purpose with sufficient specificity so as to allow review by the courts. Also, precedent established by this Court dictates that the reviewing Courts must determine the relevance of the items sought by the subject subpoenas. However, notwithstanding these precedents, the Temporary Emergency Court of Appeals and the district court has expressly refused to even consider relevance. Such action by the lower courts requires supervision by this Court in order to settle conflicts with applicable decisions of this Court.

ARGUMENT

A. THE TEMPORARY EMERGENCY COURT OF APPEALS LACKED JURISDICTION OF THESE APPEALS FROM THE DISTRICT COURTS' ORDERS ENFORCING THE DEPARTMENT OF ENERGY SUBPOENAS AGAINST PETITIONERS.

The Temporary Emergency Court of Appeals lacked subject matter jurisdiction of the present appeal, since the appeal did not involve issues or controversies under the Economic Stabilization Act (ESA) (A.5) or Emergency Petroleum Allocation Act (EPAA). Therefore, the Mandate issued by the Court is null and void.

The Temporary Emergency Court of Appeals, unlike the other Circuit Courts of Appeal, is a court of special jurisdiction and competence. *United States v. Zang*, 545 F.2d 999, 1002 (Em. App. 1981); U.S. Code Cong. & Admin. News 1971, pp. 2283, 2292.

Under Section 211 (b)(2) of the Economic Stabilization Act of 1970 (ESA) (A.5), the Temporary Emergency Court of Appeals is vested with exclusive jurisdiction "of all appeals from the District Courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." 12 U.S.C. § 1904 note (Supp. 1977).[3]

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3. This grant of special jurisdiction was carried forward by Section 5(a)(1) of the Emergency Petroleum Allocation Act (EPAA), as amended. 15 U.S.C. § 754; *United States v. Uni Oil, Inc.*, 646 F.2d 746 (5th Circ. 1981) (App. for Writ. of Cert. pending); *United States v. Zang, supra*, at 1002; *United States v. Wickland*, 619 F.2d 75, 78 (Em. App. 1980).

In determining whether a particular case arises under the ESA, EPAA, or a regulation thereunder, a strict construction must be given to the term "in cases and controversies arising under this title" in light of the traditional rule that courts of special jurisdiction should strictly construe their statutory grants of jurisdiction. *United States v. Zang, supra,* at 1002; *United States v. Cooper,* 482 F. 2d 1393, 1398 (Em. App. 1973); *Texaco, Inc. v. Department of Energy,* 616 F.2d 1193, 1197 (Em. App. 1979).

A case or controversy is said to "arise under this title" (i.e., involve an ESA or EPAA issue), if the case involves issues that must be decided by the Temporary Emergency Court of Appeals in order that "uniform interpretation of the substantive provisions of the statute" may be achieved. In *United States v. Uni Oil, Inc., supra,* at 951, the Fifth Circuit made this additional comment:

> The case or controversy itself must arise under the statute or regulations; the resolution of the issue must turn on proper interpretation of ESA or EPAA. (*Id.* at 950).

When a case or controversy does not require interpretation of the substantive provisions of the ESA or EPAA, it is not a case arising under the ESA or EPAA, *Bray v. United States,* 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975); *United States v. Uni Oil, Inc., supra,* at 952, and the Temporary Emergency Court of Appeals will decline jurisdiction of the appeal.

The present appeal involves the enforcement of two subpoenas issued by the Department of Energy under its ESA, EPAA, and regulatory powers. Thus, the threshhold question presented is this: Does the appeal of an order enforcing a Department of Energy subpoena involve or

require the interpretation of the substantive provisions of the ESA, EPAA, and, or regulations arising thereunder? The answer to this question is clearly "no".

The applicable sections of the ESA and EPAA provide that "[t]he head of an agency exercising authority under this title, or his duly authorized agent, shall have authority . . . to sign and issue subpoenas . . ." (Section 206 of the ESA). The substantive provisions of both the ESA and EPAA do not control other aspects of Department of Energy subpoenas, except to authorize the enforcement of Department of Energy subpoenas in the district courts. These statutes do not expressly or impliedly vest the TECA with jurisdiction of appeals from district court Orders enforcing Department of Energy subpoenas. Thus, the substantive provisions of the ESA and EPAA encompass only the Department of Energy's authority to issue subpoenas.

The substantive provisions make no mention of the general legal issues concerning the validity of a subpoena issued pursuant to the ESA or EPAA. The rules related to the review of a subpoena, issued by any and all agencies, have been firmly formulated by the United States Supreme Court. *United States v. Powell*, 379 U.S. 48 (1964); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). These established rules and guidelines do not require the interpretation of, and are not subject to, any substantive provisions of the ESA or EPAA.

Had Petitioners attacked the Department of Energy's authority to issue subpoenas under the ESA or EPAA, this appeal would have unquestionably required the interpretation of the substantive provisions of the ESA or

EPAA. However, Petitioners have always recognized the Department's fundamental authority to issue the subpoenas in question. Instead, the Petitioners, on the basis of general legal principles unrelated to the ESA and EPAA, question the validity of the subpoenas themselves. These appeals involve the application of the general legal principles derived from Supreme Court precedent and do not require interpretation of any substantive provision of either the ESA or EPAA.

Clearly, then, an appeal of a district court Order enforcing a Department of Energy subpoena should be brought to the appropriate Circuit Court, unless the Department of Energy's authority is questioned.[4]

Nothing in the ESA, EPAA or in the legislative histories of these acts supports the proposition that Congress intended the Temporary Emergency Court of Appeals to review routine subpoena cases, since review of these cases by the TECA is not necessary to assure uniform interpretation of the substantive provisions of the ESA and EPAA. *Bray v. United States, supra,* at 75. Accordingly, jurisdiction over these appeals is vested with the United States Court of Appeals for the Fifth Circuit.

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4. In arriving at this conclusion, Petitioners do not overlook the case of *United States v. Wickland, supra,* which was not reviewed by this Court. In that case the TECA held that Department of Energy subpoena cases involve a "federal agency's attempt to fulfill its duty under statutes and regulations over which this Court (TECA) has exclusive jurisdiction. The District Court has 'adjudicated' an 'EPAA issue'." While Petitioners concur in the first part of the TECA's analysis, the Court's conclusion, based on 'policy' considerations, that subpoena cases involve EPAA issues would require an extremely broad construction of the TECA's jurisdiction contrary to the traditional and well-founded principles requiring a court of special and limited jurisdiction to strictly construe its own jurisdiction. See *United States v. Uni Oil, Inc., supra,* at 952 (footnote 3).

B. THE DEPARTMENT OF ENERGY'S COMMENCEMENT OF ITS AUDIT OF PETITIONERS IN VIOLATION OF A REGULATION PROHIBITING THE DEPARTMENT FROM COMMENCING AUDITS WITHOUT "PROBABLE CAUSE" DEPRIVED PETITIONERS OF THEIR DUE PROCESS.

1. Reasons for Binding an Agency to its Regulations or Published Procedures: the TECA's Decision Conflicts with Supreme Court and Circuit Court Authorities.

In *United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465 (1979), this Court explained that its decisions in prior cases, wherein agency action in violation of procedures or regulations was upheld, "demonstrates that the [agency] was not required by the Constitution to adopt these regulations." *Id.* at 75. However, this Court also recognized that even agency procedures or regulations not mandated by the Constitution or some specific statute must be followed by the agency, if the result of any violation of the procedure would be to affect an individual's rights, or implicate the Due Process Clause.

The Court recognized that Constitutional safeguards, such as Due Process, could invalidate agency action which runs afoul of a published procedure or regulation. This principle is demonstrated by the Court's comment:

> Nor is this a case in which the Due Process Clause is implicated because an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency.

Thus, according to this Court in *Caceres* an agency is bound by its regulations or procedures when: (1) the regulation is mandated by the Constitution or Statute; (2) the agency's violation of the regulation or procedure would affect an individual's rights; and (3) Due Process requires the agency to follow the regulation. Petitioners do not rely on the first or second reasons for invalidating the Department of Energy's actions herein, but rely on the third reason. The Due Process Clause is implicated when an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency. *United States v. Caceres, supra,* at 752, 753. Invalidation of agency action under the Due Process Clause is not dependent on whether that regulation has foundation in the Constitution or some Act of Congress. *Service v. Dulles,* 354 U.S. 363, 77 S.Ct. 1152 (1957); *Accardi v. Shaughnessy,* 347 U.S. 260, 74 S.Ct. 499 (1954); *United States v. Heffner,* 420 F.2d 809 (4th Circ. 1969). This Court, in *Vitarelli v. Seaton,* 359 U.S. 535, 79 S.Ct. 968 (1959), held that the Secretary of Interior violated petitioner's Due Process by failing to follow an Order which the Secretary had "no law-imposed or self-imposed obligation to promulgate." The Fourth Circuit in *United States v. Heffner,* at page 812, based on the *Vitarelli* case, concluded that "it made no difference that the State Department had no statutory or constitutional obligation to establish the procedure in question" for an agency to be bound by its published procedure or regulation.

The TECA, in *United States v. Fitch Oil Company,* ____F.2d____, No. 5-70, March 23, 1982 (Em. App.),

subscribed to the proposition that an agency's violation of its own published announcement runs afoul of the Due Process Clause *only* when the policy so announced is mandated by the Constitution or Statute of Congress. This principle is incorrect and in direct conflict with Supreme Court cases and various Circuit Court cases.

In *Fitch Oil*, the TECA observed that *Leahey, supra*, involved an Internal Revenue Service press release requiring the agency's special agent to inform a taxpayer, upon initial contact, that he has the function of investigating the possibility of criminal tax fraud. The TECA further observed that the IRS press release was promulgated in response to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Based on this, the TECA assumed that "[t]he Court in *Leahey* held the agency accountable to its statement of procedure because the procedure was adopted to protect constitutional rights of the individual." *Id.* at 6.

According to *Leahey*, however, Due Process requires an agency to follow its announced procedures when the two following factors are present:

1. when the objective of the procedure is uniform conduct by all agents; and

2. when the public announcement is deliberately made in response to inquiries and is one on which people and their advisors could reasonably and expectably rely.

As to the first reason why Due Process requires an agency to follow an announced policy, the Court in *Leahey* states:

> It is important here that the procedure set forth in the news release was an agency wide directive designed to protect taxpayers by setting a clear and UNIFORM standard governing the first contact between special agent and a tax fraud suspect. Our result would have been different if the I.R.S. had violated a procedure designed to promote some other agency goal. (Emphasis Ours).

The Court's emphasis was not on the constitutional issue, but on the importance of UNIFORMITY and consistency of agency action. This is conclusively demonstrated by the Court's illustration which followed the above quote and which concerned an I.R.S. procedure requiring only trained I.R.S. agents to interview suspects. With respect to such a policy, if violated, the *Leahey* Court noted:

> Such a deviation from I.R.S. procedures would not deprive the person interviewed of protection that was *afforded to other taxpayers;* his interview *would not differ signicantly from others* except that his questioner would be less adept. (Emphasis Ours).

As evidenced by the above illustration, the Court's primary emphasis was on *UNIFORMITY*. This conclusion is supported by leading authorities. See, 2 Davis, *Administrative Law*, Second Edition, § 7:21. The type of protection afforded by the pronouncement was of no consequence to the Court. The fact that the protection afforded by an agency's published policy is rooted in the Constitution or some statute is of no consequence. The policy will be upheld on Due Process grounds as long as the protection afforded by the procedure is intended to be uniformly applied. Without uniformity, "citizens'

faith in the even-handed administration of the laws would be eroded—just as much as if a municipality applied an ordinance only to a selected group. CF. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)." *United States v. Leahey, supra*, at 10; Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L.R. 629, at 630 (1974).

The fact that *Leahey* involved an issue as important as that involved in *Miranda* is only coincidental. The concern of the *Leahey* Court was not that the *Miranda* warnings were required to be given in such cases, because the Court expressly refused "to require that the full panoply of *Miranda* warnings be given a taxpayer, not in custody who is interviewed by I.R.S. agents". *Id.* at 8.

As to the second reason why the *Leahey* Court determined that Due Process requires an agency to follow an announced policy, such policy is deliberately promulgated in response to inquiries and is intended to be a policy upon which persons and their advisors can reasonably and expectably rely. When an agency 'goes public' it does not do so lightly. Its obligations increase just as do those of a private corporation. *United States v. Leahey, supra*, at 10. This is consistent with this Court's opinion in *Caceres*, where the Court concluded that the Due Process Clause is implicated when a person suffers significant injury due to his reliance on a regulation and the agency's violation of that regulation.

The apparent conflict between the *Leahey* case and the case of *United States v. Fitch Oil*, is due to the TECA's misconstruction of the *Leahey* case. The Temporary Emergency Court of Appeals in *Fitch Oil* held that Due Process

requires an agency to follow only those regulations which are mandated by the Constitution or Act of Congress, contrary to the principles set forth in *Leahey*. The *Leahey* Court did not espouse the principle that an agency must follow only those regulations rooted in the Constitution or some statute. Rather, the *Leahey* Court intended to secure an agency's compliance with published procedures providing for *uniform* conduct by that agency and, at the same time, assure regulated entities that their reliance on the announced procedure will be with impunity.

It appears also that the TECA in *Fitch Oil*, and the present appeals, refused to recognize other accepted reasons, such as Due Process, for invalidating agency action in violation of that agency's published procedures or regulations. Instead, the TECA would propose to invalidate agency actions in violation of a promulgated regulation *only* when the regulation is mandated by the Constitution or statute. This is incorrect because there exist other reasons, such as the Due Process Clause, for binding an agency to its regulations and published procedures. *United States v. Caceres, supra; United States v. Leahey, supra; United States v. Heffner, supra.*

2. The Department of Energy's Violation of its Audit Policy Violated Petitioners' Due Process.

On June 27, 1978, the Department of Energy published a procedural regulation. 10 C.F.R., Part 210 Appendix "A" (43 Fed. Reg. 27,782), set out in full on page 3 herein.

A reading of the audit policy as a whole indicates that this policy actually declares two (2) new policies concerning audits.

Paragraph "A" of the policy imposes the requirement that there be a complaint or some other credible indications of significant violation before the Department of Energy may commence an investigation of any reseller, retailer-reseller or retailer of petroleum products, except propane.

Paragraph "B" imposes a time limitation on the Department of Energy with respect to the imposition of civil penalties for previous transactions.

Thus, while the term "audit policy" suggests the existence of only one policy, the Department of Energy actually promulgated *two* related, but independent, policies. Only the policy found in paragraph "A" is of major importance here.

The mandate of Paragraph "A" of the audit policy requires the Department of Energy to commence any price regulation audits after June 30, 1978, of any reseller of petroleum products, such as Petitioners, only upon: (1) a complaint; or (2) some other credible indications of a significant violation.

During the Andrus show cause hearing, Mr. James Gardner, Supervisory Auditor of the Department of Energy, testified that the subpoena was issued without any credible indication of a significant violation, that there was no complaint filed against Andrus, and that the investigation was merely routine. (Transcript, p. 13).

Virtually identical testimony was adduced in the Robison show cause hearing from Mr. James Louthan, Audit Director of the Department of Energy.

In light of the uncontradicted evidence adduced in both cases, the investigation of Petitioners, which prompted the issuance of the subject subpoenas, is clearly in derogation of the Department of Energy's own regulation concerning the commencement of new audits or investigations.

Paragraph "A" of the policy establishes an agency-wide standard which must be met before a new audit and investigation may be commenced. The "policy" serves the obvious purpose of safeguarding resellers from the commencement of investigations which are not founded on some element of "probable cause." Admittedly, the policy generously exceeds all constitutional requirements, as the United States Supreme Court has clearly proclaimed that an agency audit or investigation may be commenced without any "probable cause". *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964). However, the fact that a regulation generously exceeds the requirements of the Constitution or statute has no bearing on whether an agency violates an individual's Due Process when it violates that regulation. *Vitarelli v. Seaton, supra; United States v. Heffner, supra.* While the audit policy in question is not mandated by the Constitution, this procedural regulation does provide a basis for uniformity and consistency in the commencement of Department of Energy investigations. No longer would the Department of Energy be entitled to randomly select targets without resorting to any particular standard. Under the audit policy the commencement of an audit is proper only when there is "probable cause" (some credible indications of significant violation). Thus, the policy, by prohibiting the commencement of audits without a showing of "Probable cause", precluded the random commencement of audits. Conversely, the imposition of a "probable cause" standard

resulted in uniformity with regard to the Department of Energy's commencement of new audits and investigations and, at the same time, granted certainty to regulated firms.

Violation of the Department of Energy "audit policy" in selected cases would signal the end of the agency's consistency and uniformity with regard to audits and would lead to the erosion of "citizens' faith in the even-handed administration of the laws. . .". *United States v. Tobins*, 512 F.Supp. 308 (D.C. Mass. 1981).

When an agency "goes public" it does not do so lightly. Its obligations increase just as do those of a privat corporation. *United States v. Leahey, supra,* at 10. The *Leahey* Court continues:

> There is no way of assuring that, once the public announcement has been made, some alert taxpayers (target) or their lawyers have not relied on it. *Id.* at 11.

The same holds true with the Department of Energy's audit policy under review in this appeal. The department of Energy's avowed purpose was "to grant certainty to firms". *United States v. Tobins, supra,* at 315. Prior to the promulgation of the new audit "policy", the DOE was "aware of particular difficulties that may be faced by certain small firms in complying with price regulations and of the responsibility to allocate its [DOE's] resources to those audit areas having the greatest enforcement potential". 43 F.R. 27,777, at 27,779.

Based on this new audit policy, Petitioners were justified in relying on the DOE's promise that they would not be audited or investigated except in response to a complaint or some other credible indications of significant

violation. Relying on this procedural regulation, Petitioners could reasonably be expected to and did invest large sums of money ordinarily allocated to comply with and defend against unauthorized and improper Department of Energy audits into other areas and programs, including research and development of natural resources. Thus, when the Department of Energy's surprise audit was commenced against Petitioners, and firms similarly situated, they were less prepared to meet the financial burdens of complying with or defending against the unlawful audit.

As in *Leahey*, the present appeal presents a conjunction of two reasons why *Due Process* requires the Department of Energy to follow its published audit policy: (1) the objective of promoting uniform conduct of agency personnel and consistency of agency actions so as not to cause the erosion of citizens' faith in the even-handed administration of the law; and (2) a deliberate public announcement, made in response to inquiries and Congressional dissatisfaction, on which regulated entities and their advisors could reasonably and expectably rely. *United States v. Tobins, supra; United States v. Leahey, supra*, at 11.[5] Since the circumstances of the present case clearly fall within the purview of the *Leahey* decision, this Court should invalidate the Department of Energy's investigation and audit of Petitioners and the subpoenas issued incident thereto.

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5. In *Vitarelli v. Seaton, supra*, at 547, Mr. Justice Frankfurter, in his concurring opinion, offers a more basic explanation why procedural regulations must be followed:

> Accordingly, if dismissal from employment is based on defined procedure, even though generous beyond the requirements that bind such agencies, that procedure must be scrupulously observed . . . This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

3. The TECA's Conclusion that Only Legislative Rules are Binding on Agencies is Erroneous and in Conflict with Various Circuit Courts.

In *Fitch Oil*, the TECA concluded that "[t]he audit policy in question was not a legislative rule by designation or substance and [t]herefore . . . was not binding" on the Department of Energy. *Id.* at 8.

At the outset, Petitioners vigorously maintain that the "audit policy" was a rule and a regulation in substance. However, should this Court determine that the audit policy is exactly that, a policy, and not a regulation, that should have no bearing on whether the Department of Energy was bound by the Due Process Clause to follow the policy. If a procedure is deliberately published to promote *uniform* agency conduct and is of such a nature that regulated entities could reasonably and expectably rely on it and such entities do in fact rely on it, the agency is required to follow it. *United States v. Caceres, supra,* at 752, 753; *United States v. Leahey, supra; United States v. Tobins, supra.* Thus, in *Leahey*, the First Circuit required the Internal Revenue Service to abide by a *press release* because regulated entities could expectably rely on it and the directive in the release was intended to assure *uniform* conduct of IRS agents with respect to the agent's initial conduct with the taxpayer target. Likewise, the Fourth Circuit in *United States v. Heffner*, 420 F.2d 809 (4th Circ. 1969), held that the Internal Revenue Service was required to follow the same or similar *press release* discussed in *Leahey*.

In doing so, the Court, at page 812, made the following comment with respect to the nature of the agency procedure in question:

> Nor does it matter that their IRS instructions to Special Agents were not promulgated in something formally labeled a "Regulation" or adopted with strict regard to the Administrative Procedure Act; the *Accardi* doctrine has a broader sweep.[6]

There is, therefore, a need for the Court to grant this Petition to enable the Court to resolve the irreconcilable conflict between the TECA and the other Circuits with regard to this issue.

4. The TECA's Conclusion That the Audit Policy Does Not Apply to Crude Oil Resellers is Erroneous.

The TECA, at Pages Two (2) and Three (3) of its opinion issued in the instant appeals, held that the Audit Policy "applies to resellers of *petroleum products* but for expressed reasons clearly excepts from its operation resellers of crude oil, which Appellants are."

The Statement of Policy which precedes the Audit Policy unquestionably includes crude oil resellers, by its own terms:

> A. It is the policy of the Economic Regulatory Administration (ERA) not to commence any price regulation audits after June 30, 1978, at:

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6. The Court then noted that this Court has applied the *Accardi* doctrine in *Vitarelli v. Seaton* to a Department of Interior "Order"; that the Circuit Courts have applied the doctrine to the Army's "Weekly Bulletin 42," § 4(c) (Oct. 20, 1967), *Smith v. Resor*, 406 F.2d 141 (2nd Circ. 1969); an F.C.C. "Rule" which had not been formally promulgated as a regulation, *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Circ. 1959); an FCC "standard", *American Broadcasting Co., Inc. v. FCC*, 179 F.2d 437 (D.C. Circ. 1949); and a Department of Defense "Directive", *Brooks v. Clifford*, 409 F.2d 700 (4th Circ. 1969).

> (1) Any resellers, resellers-retailers or retailers (*as defined in 10 C.F.R. 212.31*) of petroleum products other than propane. . . . (Emphasis added).

The Department of Energy regulations do not provide a definition for the term "petroleum product". However, the term "covered products" is defined in 10 C.F.R., § 212.31 as follows:

> "Covered products" means *crude oil*, gasoline, natural gas liquids and propane. . . . (Emphasis added).

In addition to being a 'covered product', propane is considered by the Department of Energy to be a "petroleum product". Had the Department of Energy not considered propane to be a petroleum product the agency would have had no reason to expressly exclude resellers of propane from the policy. In light of the fact that propane is both a covered product and a petroleum product at the same time, there is no reason for not treating crude oil in a similar manner.

Logically, if the Department of Energy had intended to exempt crude oil resellers, it would have expressly so stated as it did in the case of propane resellers.

On the other hand, Paragraph "B" of the subject Policy, which relates to limitation of actions under the regulations, specifically excepts crude oil resellers. The fact that crude oil resellers were specifically excepted from the coverage of Paragraph "B" of the Policy, but not from Paragraph "A" thereof, serves as additional evidence that Paragraph "A" is to apply to crude oil resellers.

The TECA refers to the preamble of the subject Statement of Policy as evidence that such policy is not intended to benefit crude oil resellers. Petitioners respectfully submit that all comments related to crude oil resellers in the preamble and in the Statement of Policy itself relate to the time limitations on openings of new audits as set forth in Paragraph "B" of the Policy. Such references to crude oil resellers in no way relate to Paragraph "A" of the subject policy which requires the Department of Energy to commence audits in response to complaints or other credible indications of significant violation. Thus, crude oil resellers do benefit from Paragraph "A" of the Policy and the TECA is in error in this regard.

C. WHETHER THE DEPARTMENT OF ENERGY SUBPOENAS MUST BE INVALIDATED AS THEY CONSTITUTE UNLAWFUL GENERAL WARRANTS.

Every agency must disclose with specificity its purpose for the subpoena and the investigation. The requirement is not satisfied by merely reciting that "the purpose of the investigation is to determine compliance with the law". *Civil Aeronautics Board v. United Airlines, Inc.*, 542 F.2d 394 (7th Circ. 1976); *Southern Railway Company v. Interstate Commerce Commission*, 553 F.2d 1345 (D.C. Circ. 1977); *Civil Aeronautics Board v. Frontier Airlines, Inc.*, 468 F.Supp. 443 (D.C. Colo. 1979); *Sunshine Gas Company v. Department of Energy*, 524 F.Supp. 834 (N.D. Tex. 1981).

The subject subpoenas each contain the following statement of purpose:

> "to determine whether said Corporation violated the provisions of the Mandatory Petroleum Price and Allocation Regulations (10 C.F.R., Parts 210, 211 and 212) and Administrative Procedures and Sanctions (10 C.F.R., Part 205) with regard to purchases and sales of crude oil."

Even a cursory review of the Code of Federal Regulations would confirm the fact that Parts 210, 211 and 212 of Title Ten (10), when taken together, contain each and every Mandatory Petroleum Price and Allocation Regulation which Petitioners could have conceivably violated.

Thus, the Department of Energy Subpoenas in these consolidated cases did not state the purpose of the investigation with any more specificity than had the subpoenas merely declared their purpose to be "to determine whether the said corporations had violated the law". Such a recital must be rejected as it provides no basis for determining whether the subpoenaed items are relevant to the agency investigation. *Civil Aeronautics Board v. United Airlines, Inc., supra.*

The Court in *Sunshine*, at page 840, finding support in *Civil Aeronautics Board v. United Airlines, Inc.*, concludes:

> . . . in summary the decisions uniformly require that an investigative demand be reasonably definite to and relevant to some proper investigative purpose. Further, the Board must disclose its purpose to enable a court to make a determination of relevance. Otherwise no inquiry 'into the underlying reasons for the examination' . . . is possible. This obligation is, of course, *not satisfied by a recital that the pur-*

> *pose of the investigation is to determine compliance with the law". Id.*, at 402; See, e.g., *C.A.B. v. Frontier Airlines*, 468 F.Supp. 443, 447 (D.C. Colo. 1979). (Emphasis Added).

From the *United Airlines* case and its progeny the following rules emerge: (1) the agency demand, in whatever form, must specify a purpose for the particular demand; and (2) that purpose must be stated with sufficient specificity.

The sole issue to be resolved under the first principle is simply whether any purpose for the demand is stated. If no purpose is stated, the demand will not be enforced by the reviewing court. However, if the demand is accompanied by a purpose, the second principle requires the reviewing court to determine whether the purpose is stated with the specificity required by law. Under the second principle, the obligation of an agency to include a sufficiently specific purpose is not satisfied by the agency's recital that "the purpose of the investigation is to determine compliance with the law". *Civil Aeronautics Board v. United Airlines, Inc., supra* at 402; *Sunshine Gas Company v. United States Department of Energy, supra* at 840; *Civil Aeronautics Board v. Frontier Airlines, Inc., supra.*

In accordance with the foregoing authorities and in light of the all encompassing terminology contained in the purpose clause of the instant subpoenas, the only just conclusion is that the Department of Energy failed to state the purpose of its investigation with the specificity required by law and that the lower Court erred by enforcing the Department of Energy subpoenas in question.

D. WHETHER THE TEMPORARY EMERGENCY COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT ORDERS ENFORCING THE DEPARTMENT OF ENERGY SUBPOENAS IN LIGHT OF THE FACT THAT THE DISTRICT COURT EXPRESSLY REFUSED TO MAKE A DETERMINATION OF THE RELEVANCE OF THE SUBPOENAED DOCUMENTS.

It is well established by this Court, in subpoena enforcement matters, that reviewing Courts must consider and make a determination regarding relevance of the items sought. See *United States v. Powell*, 379 U.S. 48, 85 S.Ct. 248 (1964); *United States v. First City National Bank of El Paso*, 598 F.2d 594 (Em. App. 1979). However, in Petitioner Andrus' case, the District Court expressly refused to make any such determination. The Court refused to consider relevance as the Court was of the opinion that the entire matter was solely a question of the Agency's lawful authority to issue the subject subpoenas. (Transcript, pp. 25, 26).

The District Court's blatant refusal to consider relevance in light of this Court's decision in *Powell* requires this Court to grant this Petition.

CONCLUSION

The Petitioners have demonstrated several material conflicts between the TECA and the Circuit Courts. In addition, Petitioners have raised novel and difficult questions regarding matters as basic and fundamental as the TECA's jurisdiction and as significant as an agency's violation of Petitioners' Due Process. Each one of these

matters in itself should compel this Court to grant Writ of Certiorari.

Respectfully submitted,

VACEK & WELTMAN, P.C.

By: _____

ALBERT E. VACEK, JR.
Attorney for
Appellants-Petitioners
7880 San Felipe, Suite 123
Houston, Texas 77063
(713) 975-6600

CERTIFICATE OF SERVICE

I, ALBERT E. VACEK, JR., a member of the Bar of the Supreme Court of the United States and Counsel of record for ANDRUS ENERGY CORPORATION, BILL W. ANDRUS, PRESIDENT, and ROBISON ENERGY, INC., AND GARY WOMACK, VICE-PRESIDENT, Petitioners herein, hereby certify and swear that on May _____, 1982, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari on each of the parties herein, as follows:

On the United States of America, the Department of Energy, and Department of Energy Audit Director James Louthan, Respondents herein, by depositing such copies in the United States Post Office, Houston, Texas, with first class postage prepaid, properly addressed to the post office address of the Solicitor General, the above named Respondents' Counsel of record, at the Department of Justice, Washington, D.C. 20530, and by depositing such copies in the United States Post Office, Houston, Texas, with first class postage prepaid, properly addressed to the post office address of the Counsel of record for the Respondents: Daniel K. Hedges, Robert Darden, and Angela Flores, at the Office of the United States Attorney, 515 Rusk Avenue, Houston, Texas 77002, and Frank Conforti, Department of Energy, One Allen Center, Suite 610, Houston, Texas, 77002.

All parties required to be served have been served.

Dated: May _____, 1982.

ALBERT E. VACEK, JR.
Attorney for Petitioners
VACEK & WELTMAN, P.C.,
7880 San Felipe, Suite 123,
Houston, Texas 77063
(713) 975-6600

SWORN TO AND SUBSCRIBED TO before me the undersigned Notary Public by the said Albert E. Vacek, Jr., on this the _____ day of May, 1982, to certify which witness my hand and seal of office.

(Stephen L. Weltman)

Notary Public in and for
Harris County, Texas
My Commission expires 3/9/86

APPENDIX 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-2782

UNITED STATES OF AMERICA and
DEPARTMENT OF ENERGY AUDIT
DIRECTOR JAMES LOUTHAN,
Petitioners,

v.

ANDRUS ENERGY CORPORATION and
BILL W. ANDRUS, President,
Respondents.

ORDER

On this days CAME ON TO BE HEARD the Order to Show Cause in the above-styled case. The Court having heard the evidence, argument of counsel, and reading of the pleadings and Memorandum of Law is of the opinion that the subpoena should be enforced.

It is therefore ORDERED, ADJUDGED, and DECREED that the Andrus Energy Corporation comply with the subpoena issued on February 20, 1981, except all items for which a privilege is claimed be listed and submitted to the Court for an in camera inspection within 30 days of this Order.

DONE at Houston, Texas, this 14th day of January, 1982.

/s/ JOHN V. SINGLETON
United States District Judge

APPROVED AS TO FORM:

/s/ ROBERT DARDEN
Robert Darden
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was hand-delivered to Albert E. Vacek, Jr., Attorney for Respondents, on this the 14th day of January, 1982.

Robert Darden
Assistant United States Attorney

APPENDIX 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-2834

UNITED STATES OF AMERICA,
Petitioner,

v.

ROBISON ENERGY, INC.; and GARY L. WOMACK, Vice-President of Robison Energy, Inc.,
Respondents.

ORDER ENFORCING DEPARTMENT OF ENERGY SUBPOENA

CAME ON to be heard on the 17th day of December, 1981, the Petition to Enforce Department of Energy Subpoena in the above-entitled and numbered action, said subpoena calling for production of certain records and documents by Respondent Robison Energy, Inc., and the Court, having considered all of the pleadings filed herein, the evidence presented, and the arguments of counsel for petitioner and respondents, finds as follows:

(1) That the Respondents were properly served on December 2, 1981 with a copy of this Court's Order to Show Cause issued on November 18, 1981;

(2) That the subpoena was properly issued to, and served, according to 10 C.F.R. § 205.8 and the applicable Delegation Orders of the Department of Energy, Eco-

nomic Regulatory Administration, upon Respondent Robison Energy, Inc. by serving Respondent's Vice-President, Gary L. Womack;

(3) That no officer, employee or agent of Respondent Robison Energy, Inc. appeared in response to the subpoena;

(4) That no records or documents were produced by Respondent Robison Energy, Inc. or any of its officers, employees or agents in response to the subpoena;

(5) That the subpoena was issued for a lawful purpose, that is, to conduct an audit of Robison Energy, Inc., a crude oil reseller, in order to determine its compliance with 10 C.F.R. Parts 205, 210, 211, and 212, and in accord with the Department of Energy's published policy;

(6) That the records and documents sought pursuant to the subpoena are reasonably relevant to the stated lawful purpose of the subpoena;

(7) That the subpoena is not overly broad given the fact that the Department of Energy has not previously audited Robison Energy, Inc. and does not know what types of business records it actually maintains;

(8) That no showing of specific need is necessary to determine the reasonable relevance of the materials sought by the subpoena;

(9) That there was no showing that the request for production of ERA Forms 69 is unnecessarily duplicative;

(10) That Respondents have presented no legally sufficient defense which would bar enforcement of the subpoena; and,

(11) That Respondents have presented no evidence that the subpoena was issued in bad faith or that its enforcement would constitute an abuse of this Court's process; it is therefore

ORDERED, ADJUDGED and DECREED that Respondent Robison Energy, Inc., by and through any duly authorized officer, employee or agent, comply with the subpoena and produce the records and documents requested in the subpoena, at such time and place as may be mutually arranged between the parties, but in any event no later than twenty (20) days from the date of this Order. If production is made at the offices of Robison Energy, Inc., the Department of Energy shall be permitted to reproduce such documents as DOE considers necessary. Reproduction shall be accomplished on Robison Energy equipment, for the use of which DOE will pay appropriate costs, not to exceed $.10 per copy.

DONE at Houston, Texas, on this the 21st day of December, 1981.

/s/ NORMAN BLACK
United States District Judge

APPENDIX 3

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. 5-71 and 5-77

UNITED STATES OF AMERICA, et al.,
Petitioners-Appellees,

v.

ANDRUS ENERGY CORPORATION, et al.,
Respondents-Appellants.

No. 5-72

UNITED STATES OF AMERICA,
Petitioner-Appellee,

v.

ROBISON ENERGY, INC. and
GARY WOMACK, Vice President,
Respondents-Appellants.

On Appeals from the United States District Court
For the Southern District of Texas

(Civil Nos. H-81-2782 and H-81-2834)

(Submitted on the briefs Decided: April 9, 1982)

ALBERT E. VACEK, JR. and STEVEN L. WELTMAN, Vacek & Weltman, P.C., Houston, Texas, were on

the briefs for Appellants Andrus Energy Corporation, et al. and Robison Energy, Inc., et al.

DANIEL K. HEDGES, United States Attorney, and C. J. (Neil) Calnan and Robert Darden, Assistant United States Attorneys, Houston, Texas, were on the brief for Appellees, United States of America, et al. in Nos. 5-71/5-77.

DANIEL K. HEDGES, United States Attorney, and C. J. (Neil) Calnan and M. Angela Flores, Assistant United States Attorneys, Houston, Texas, were on the brief for Appellee, United States of America, in No. 5-72.

Before Ingraham, Estes and Pointer, Judges.

Per Curiam:

Appellants' challenges of the Department of Energy subpoenas in question and the orders enforcing them by United States District Judges Singleton and Black of the Southern District of Texas are frivolous and entirely without merit.

This court has repeatedly upheld enforcement of DOE's and its predecessor agencies' subpoenas seeking similar information relevant to the same lawfully authorized purpose. *United States v. Empire Gas Corp.*, 547 F.2d 1147 (TECA 1976), *cert. denied*, 430 U.S. 915 (1977), *United States v. Pasco Petroleum Co.*, 633 F.2d 956, 958-9 (TECA 1980), *cert. denied*, 450 U.S. 995 (1981), *United States v. Fitch*, No. 5-70 (TECA, Mar. 23, 1982), ____F.2d____, *United States v. Pel-Star Energy, Inc.*, No. 5-68 (TECA, Jan. 25, 1982), Slip Op., 5, ____F.2d____, *United States v. Wickland*, 619 F.2d 75 (TECA 1980), *United States v. First City National Bank of El Paso*, 598 F.2d 594 (TECA 1979), *United States v. Southwest Na-*

tional Bank, 598 F.2d 600 (TECA 1979), *United States v. Bell*, 564 F.2d 953 (TECA 1977). The subpoenas in question are valid and were properly enforced.

Moreover, the contentions of Appellants that the DOE audit policy statement barred the issuance and enforcement of the subpoenas in question overlooks the fact that when read as a whole with the preamble* published contemporaneously therewith, 43 Fed. Reg. 27,777, the policy applies to resellers of *petroleum products* but for expressed reasons clearly excepts from its operation resellers of *crude oil*, which Appellants are.

"Basically, the power to compel the production of the records of any organization arises out of the inherent and necessary power of the federal and state governments to enforce their laws. . . ." *United States v. White*, 322 U.S. 694, at 701, 64 S.Ct. 1248, at 1252 (1944), quoted in *United States v. Empire Gas Corp., supra*, at 1153. The learned district judge in *Empire Gas Corp.* correctly stated: "It is . . . significant that the applicability of the regulations to respondents cannot be determined until the information sought by subpoena is made available to the [DOE] investigators." *Id.*

The orders and judgments of the District Court in the above-captioned appeals, Nos. 5-71/5-77 and 5-72, should be affirmed and these appeals dismissed. IT IS SO ORDERED.

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* *Wiggins Bros., Inc., et al. v. Department of Energy, et al.*, 667 F.2d 77, 88 (TECA 1981), *cert. denied*, Mar. 29, 1982, ____ U.S.____; *Gulf Oil Corp., et al. v. Department of Energy, et al.*, No. 3-26 (TECA, Mar. 26, 1982), ____F.2d____.

APPENDIX 4

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. 5-71 and 5-77

UNITED STATES OF AMERICA, et al.,
Petitioners-Appellees,

v.

ANDRUS ENERGY CORPORATION, et al.,
Respondents-Appellants.

No. 5-72

UNITED STATES OF AMERICA,
Petitioner-Appellee,

v.

ROBISON ENERGY, INC., et al.,
Respondents-Appellants.

Before: INGRAM, ESTES and POINTER, Judges.

ORDER DENYING APPELLANTS' PETITION FOR REHEARING

Having duly considered Appellants' petition for rehearing, the Court is of the opinion that such petition is entirely without merit, that Appellants' assertion therein that

this court does not have jurisdiction* is also frivolous, and such petition should be denied.

It is therefore ORDERED that Appellants' petition for rehearing is hereby denied. The mandate shall issue on Friday, May 7, 1982.

FOR THE COURT:

/s/ DONNA M. BOLD
Donna M. Bold
Clerk

April 30, 1982

* "We hold this Court has exclusive jurisdiction of this appeal. §§ 206 and 211 Economic Stabilization Act (ESA) of 1970, as amended, 12 U.S.C. § 1904 note [incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act (EPAA) of 1973, 15 U.S.C. § 754], §§ 301, 502 and 705 of the Department of Energy Organization Act (DOEOA), 42 U.S.C. §§ 7151, 7192 and 7295, and 10 C.F.R. §§ 205.8 and 205.201." United States v. Pel-Star Energy, Inc., 670 F.2d 1032, 1033 (TECA 1982); United States v. Wickland, 619 F.2d 75, 77-79 (TECA 1980).

APPENDIX 5

§ 211. Judicial Review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may

render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temorary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding in-

structions and remand the action to the certifying court for further disposition.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code [section 706(2) of Title 5], and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code [section 1292(b) of Title 28]; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to

declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code [section 706(2) of Title 5], or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g)

within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code [section 1254 of Title 28]. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section [Dec. 22, 1971] in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.